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Supreme Court of the United States

October Term, 1934

No. 134

HARRY SCHNELL and SAMUEL SCHNELL, co-partners doing business as H. Schnell & Co.
Petitioners
(*Libellants below*)

against

The Steamship VALLESCURA, her engines, etc., LLOYD MEDITERRANEO
Respondents
(*Appellants-Respondents below*)

Petition of H. Schnell & Co., and Brief in Support of Petition for Writ of Certiorari

LOUIS JOFFE
Counsel for Petitioners
141 Broadway
New York City

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Supreme Court of the United States

HARRY SCHNELL and SAMUEL SCHNELL, co-partners, doing business as H. SCHNELL & Co.,

Petitioners,
(Libellants below),

against

The Steamship VALLESCURA, her engines, etc., LLOYD MEDITERRANEO,

Respondents,
(Appellants-Respondents below).

October Term 1934

No.....

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of H. Schnell & Company, a partnership, respectfully shows to this Court as follows:

I. This is a petition to review a final decision and judgment, in admiralty, of the United States Circuit Court of Appeals for the Second Circuit, which reversed the final decree of the District Court for the Southern District of New York, for the libellants, upon which decision and mandate, the libel was dismissed. The opinion of the District Court (THACHER, *J.*) is reported in 43 F. (2d) 247, and found at pages 318-322 of the Record. The opinion of the Circuit Court of Appeals is reported in 70 F. (2d) 261 and found at pages 442-445 of the Record.

II. The libellants are importers who sought to recover for damage to onions shipped from Spain to New York aboard the S. S. *Vallescura* to petitioners as consignees (R. pp. 4-9).

The carrier pleaded as a complete defense an exception against "decay" in the bill of lading (R. pp. 16-17); also "perils of the seas" (R. pp. 14-16), and alleged "and was not due to any cause or event arising through any fault or negligence on the part of the said vessel, her master, owner, agents * * *" (R. pp. 16, 17).

III. The District Court (THACHER, *J.*) found that the damage was due to lack of ventilation, to which two causes contributed. One cause was due to the negligence of the ship (R. p. 321):

> "Thus it appears that this notoriously perishable cargo of Spanish onions (*The Buckleigh*, 1929 A. M. C. 449, 450) was deprived of all ventilation during the nighttime, regardless of the state of the weather. Such treatment was obviously ruinous, and must have caused *substantial damage.*" (Italics ours.)

The other cause was (R. p. 322):

> "*It may be* that considerable damage resulted to this cargo from lack of ventilation during periods of the voyage when weather conditions required the closing of hatches and ventilators. If this be true difficulties of proof may arise." (Italics ours.)

The District Court entered an interlocutory decree in favor of the libellants, referring the matter to a special master to ascertain the damage due to the negligence of the ship (R. pp. 323-324).

IV. The report of the Commissioner (Mr. PARKIN, Clerk of the Circuit Court of Appeals) is found at pages

419-426 of the Record. He found that out of a total of 552 hours when the ventilators and hatches were closed, they were *improperly* closed during 23[illegible] hours and *properly* closed during 144 hours, and "It would seem, therefore, that the greater part of the damage must have been due to the improper shutting of the hatches and ventilators" (R. pp. 421-422). He found that "from the nature of the case it is *impossible* to say how much of the decay was due" to each factor (R. p. 420). He decided (R. p. 423):

> "Where both shipper and carrier are at fault, it is plainly more just to divide the damages, but when only the carrier is at fault, and part of the damage is due to sea perils, it is more in accord with the principles applied in Equity to compel the one whose fault has caused the confusion to make the proper apportionment or bear the whose loss."

He found the sound value of the cargo was $23,249.91; that after reconditioning, there was received $17,067.14; that the cost of reconditioning was $5,081.94; so that the damage was $11,264.71; interest was added (R. p. 426).

V. The District Court (CAFFEY, *J.*) confirmed the Commissioner's report in all respects (opinion, R. p. 430), and a final decree was entered for $15,166.71, which included interest and costs (R. pp. 431-433).

VI. The Circuit Court of Appeals stated, "We accept the facts as found" but reversed (MANTON, L. HAND and CHASE, *CJJ.*), on the sole ground that the usual rule of damages is changed by the exception in the bill of lading against "decay." The Court said (R. p. 444):

> "• • • it would be more equitable, as the special master said, 'to compel the one whose

> fault has caused the confusion to make the proper apportionment or bear the whole loss.' Generally speaking, we have no quarrel with this as an equitable principle. There appear to be paramount considerations in a case of this nature, however, which require a reversal of the result which was reached without giving effect to them."

and the paramount consideration (R. p. 444):

> "It was then encumbent upon the libellants to prove that the *prima facie* defense, inherent in decay damage under the exceptions in the bills of lading, was not conclusive by showing that the decay was caused in whole or in part by the ship's negligence. Proof that it had been wholly caused by the ship's negligence would have destroyed the *prima facie* defense. Proof that the decay was caused in part by such negligence overcame that defense *pro tanto*. But as the burden was on the libellants to prove not only that the onions had been damaged but to prove recoverable damage it was necessary to prove what damage was caused by the negligence of the ship."

VII. Your petitioners respectfully submit that this decision and result are

(a) *probably in conflict with the applicable decisions of this Court.*

An exception in a bill of lading does not exonerate the ship from liability for loss or damage from an excepted peril to which its negligence *contributed.*

> *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 at 438;
> *The Edwin I. Morrison*, 153 U. S. 199 at 211;
> *The Mohler*, 88 U. S. 230 at 233;
> *The Portsmouth*, 9 Wall 682 at 684.

Where two wrongdoers in admiralty contributed to cause a damage, the innocent person may recover all the loss from either, though the Court will apportion the damage between the two wrongdoers.

The Atlas, 93 U. S. 302 at 317.

Where the libellant's negligence contributed to cause the damage, he may recover half the loss, though he cannot apportion the amount caused by the ship.

The Max Morris, 137 U. S. 1.

The general law of proof of damages is that where the nature of the case precludes the ascertainment of the amount of damages with certainty, or where it is impossible to distinguish between consequences that were lawfully originated and those unlawfully imposed, the wrongdoer must bear the uncertainty and the entire loss.

Hamilton Shoe Co. v. *Wolf Brothers,* 240 U. S. 251 at 260-262;
Story Parchment Co. v. *Paterson Co.,* 282 U. S. 555 at 563.

This "equitable principle" is applied where the inquiry was "the just indemnity for the wrong" due to the act of the wrongdoer, and in spite of the burden of proof on the injured party.

Hamilton Shoe Co. v. *Wolf Brothers, supra,* p. 261;
Westinghouse Co. v. *Wagner Mfg. Co.,* 225 U. S. 604 at 622.

(b) *the decision and result are in conflict with the decisions in other circuits.*

Where part of the damage was occasioned by an excepted peril for which the ship was not responsible,

and part was caused by its own negligence, to excuse itself for that portion of the loss for which it is not liable, the ship must show how much that portion is, and if it fails to do this, it must be held responsible for the whole damage.

The Mary Belle Roberts, 22 Fed. Cas. No. 13240 (S. D. Cal.);
Gilchrist Transp. Co. v. *Boston Ins. Co.,* 223 Fed. 716 at 722 (C. C. A. 6);
The Olga S., 25 F. (2d) 229 at 230-231 (C. C. A. 5).

Where the shipper's negligence also contributed to cause the damage, the loss is divided between the ship and the consignee, notwithstanding proof of the amount caused by the negligence of the ship is impossible of ascertainment, and notwithstanding exceptions in the bill of lading.

Snow v. *Carruth,* 22 Fed. Cas. No. 13144 (D. C. Mass.) cited with approval in *The Max Morris,* 137 U. S. 1 at 14;
American Finance Co. v. *United States,* 55 F. (2d) 725 (D. C. Cal.).

(c) *the decision and result are in conflict with the entire weight of authority.*

Cases *supra*;
The Shand, 16 Fed. at 573 (S. D. N. Y.);
Brauer v. *Compagnia Navigazione,* 66 Fed. (C. C. A. 2) at 782, affd. 168 U. S. 104;
Maghee v. *Camden etc. R. Co.,* 45 N. Y. 514 at 523;
Condict v. *Grand Trunk R. Co.,* 54 N. Y. 500 at 505.

In England, the rule is that stated in the *Mary Belle Roberts, supra.*

The Rona, 5 Asp. 259, 51 L. T. at 32;
Carver On Carriage At Sea, 7th Ed., Sec. 78, p. 114.

The decision in the case at bar is untenable because it would permit the carrier to contract against its own negligence as in this case, and "lessen, weaken and avoid" its duty of care.

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397 at 441;
Harter Act, U. S. Code, Title 46, ch. 8, Sections 190, 191;
The Delaware, 161 U. S. 459 at 471;
Calderon v. *Atlas S. S. Co.*, 170 U. S. 272.

(d) *the decision and result have decided an important question of federal law which should be settled by this Court.*

It has been repeatedly stated to counsel for petitioners by lawyers practicing in admiralty, that the decision of the Circuit Court of Appeals in question is the most important rendered in many years in "Shipping." It is to be remembered that the Second Circuit is in the most active water transportation center of the United States and the Courts therein dispose of the great majority of "shipping" cases.

The exposition of law in the decision establishes a dangerous precedent unless corrected. The decision of the Circuit Court of Appeals goes counter to the established rule of liability and proof of damages, both in admiralty and general law.

We most earnestly urge that the expressions of law be corrected, lest there be established thereby a precedent which will prevent recovery for established negligence in almost all cases of damage to perishable cargo, as it is a practical impossibility to cross the ocean without meeting some rough weather. And logically, the same result must be reached in cases of injury to passengers under similar broad exceptions.

WHEREFORE, your petitioners pray:

(a) That a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day to be designated in said writ, a full and certified transcript of the record and of proceedings in the Circuit Court of Appeals for the Second Circuit in the suit entitled "HARRY SCHNELL and SAMUEL SCHNELL, copartners, doing business as H. SCHNELL & Co. against The Steamship VALLESCURA, her engines, etc., LLOYD MEDITERRANEO, Respondent," to the end that the said suit may be reviewed and determined by this Court as provided in United States Code, Title 28, Judicial Code and Judiciary, Section 350; and that the decision and judgment of the Circuit Court of Appeals for the Second Circuit in the said suit may be reversed by this Honorable Court.

(b) That your petitioners may have such other and further relief as to this Court may seem proper and just, and in conformity with the laws of the United States.

(c) And your petitioners will ever pray, etc.

H. SCHNELL & COMPANY,

by HARRY SCHNELL.

LOUIS JOFFE,
Of Counsel for Petitioners.

State of New York,
County of New York, } ss.:

HARRY SCHNELL, being duly sworn, says that he is a member of the firm of Harry Schnell and Samuel Schnell, copartners, doing business as H. Schnell & Co., the petitioners above named, and that he has read the foregoing petition and knows the contents thereof, and the matters therein set forth are true to the best of his information, knowledge and belief.

HARRY SCHNELL.

Sworn to before me, this 16 day of June, 1934.

LEE SIMON, Notary Public
Kings Co. Clks. No. 925, Reg. No. 5252
N.Y. Co. Clks. No. 906, Reg. No. 58580
Bronx Co. Clks. No. 54, Reg. No. 206838
Queens Co. Clks. No. 1702, Reg. No. 6675
Commission expires March 30, 1935

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

LOUIS JOFFE,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

HARRY SCHNELL and SAMUEL SCHNELL, co-partners, doing business as H SCHNELL & Co., *Petitioners, (Libellants below),* *against* The Steamship VALLESCURA, her engines, etc., LLOYD MEDITERRANEO, *Respondents, (Appellants-Respondents below).*	October Term 1934 No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The Circuit Court of Appeals agrees it would be more equitable "to compel one whose fault has caused the confusion to make the proper apportionment or bear the whole loss" but states that the exceptions against "decay" in the bill of lading makes an inequitable result necessary, and requires a disregard of that equitable principle.

This paramount consideration cannot be the difference between tort and contract, because on the question of damages—*the just indemnity for the wrong*—that difference is irrelevant.

Hetzel v. *Baltimore & Ohio R. Co.*, 169 U. S. at 38.

Nor can it be on the theory that Admiralty law does not follow the common law. That is not so, for where two wrongdoers contribute to cause a damage, the innocent person may recover all the loss from either, though the Court will apportion the damage between the wrongdoers.

The Atlas, 93 U. S. 302 at 317.

Until this decision, in cases of carriers with bill of lading exceptions, the Courts found no paramount consideration which required a departure from the "equitable principle."

In the leading case of the *Mary Belle Roberts*, 22 Fed. Cas. No. 13240 (S. D. Cal.), the Court said at page 930:

> "That the cargo would have sustained, even if properly dunnaged, some injury from the unavoidable effect of sea perils encountered by the vessel, and her consequent leaking, must be admitted. But what would have been the extent of that injury, and how much of the damage is to be attributed to each cause, it is impossible now to ascertain.
>
> "The question thus arises: Is the carrier liable to make good the whole damage sustained, when the proofs show that part of it was occasioned by a cause for which he was not responsible, and part was caused by his own negligence, but he is unable to show how much was due to either cause separately?"

and decided (same page):

> "By his contract, the carrier promised to deliver the goods in like good order and condition as when received, unless prevented from so doing by one of the excepted perils. The cargo being found to be damaged, the burden of proof was

on him to show that the loss was occasioned by one of the causes which, by law and the terms of his contract, afford an excuse for its non-performance. It is not enough that he show that a part of the damage was so caused, while the remainder was caused by his own negligence. To excuse himself for that portion of the loss for which he is not liable, he must show how much that portion is; and, unable to exonerate himself *in toto*, he should establish the degree and extent of the exoneration to which he is entitled.

"If he fails to do this, it seems to me that he must be held responsible for the whole damage."

See also:

Gilchrist Transp. Co. v. *Boston Ins. Co.*, 223 Fed. 716, 720-722 (C. C. A. 6);
The Olga S., 25 Fed. (2d) 229 at 230-231 (C. C. A. 5);
The Shand, 16 Fed. at 573 (S. D. N. Y.);
Brauer v. *Compagnia Navigazione*, 66 Fed. (C. C. A. 2) at 782, affd. 168 U. S. 104.

See also:

The Mohler, 88 U. S. 230 at 233;
The Edwin I. Morrison, 153 U. S. 199 at 211;
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. at 438.

In England, the same rule is stated as to carriers and bill of lading exceptions:

"There being some negligence established, it lies upon the shipowner to distinguish, if he can, what portion of the damage which has arisen did not arise from the negligence which has been established against him * * *" (SIR J. HANNEN in *The Rona*, 51 L. T. at 32, 5 Asp. 259).

Admiralty is the most equitable of all branches of the law. There (unlike at common law) even where the shipper's negligence contributed to cause the damage and proof of the amount caused by the ship is impossible of apportionment, the loss is divided between the ship and the consignee, exceptions in the bill of lading notwithstanding.

Snow v. *Carruth,* 22 Fed. Cas. No. 13144 (D. C. Mass.), cited with approval in the *Max Morris,* 137 U. S. 1 at 14;
American Finance etc. Co. v. *United States,* 55 F. (2d) 725 (S. D. Cal.).

See also:

The Max Morris, 137 U. S. 1.

A cursory examination of the law applicable to exceptions in carrier bills of lading will show, not only that such departure from the "equitable rule" is not necessary, but is illegal and untenable.

The approach to shipping cases is summarized in *The Folmina,* 212 U. S. 354 at 361-362. Primarily, the carrier is liable as an insurer against all loss except only two irresistible causes, as act of God and public enemies. Exceptions against other causes in bills of lading (or other contract) are permitted to the extent "no human skill or diligence can guard against." If goods are received in good order and delivered damaged, the burden lies upon the carrier to show it was occasioned by one of the perils for which it was not responsible. Where the damage is "decay," "the nature of the injury shows the damage to be *prima facie* within the exception, and hence the burden (of going forward with the evidence) is upon the shipper to establish that the goods are *removed from its operation because of the negligence of the carrier.*"

Proof that the negligence of the carrier *contributed* to cause the damage, removes the goods from the operation of the exception and the carrier's liability as an insurer is unimpaired.

> "But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed" (GRAY, *J.* in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 at 438).

See to the same effect:

The Edwin I. Morrison, 153 U. S. 199 at 211;
Brauer v. *Compagnia Navigazione*, 168 U. S. 104 at 118;
Gilchrist Transp. Co. v. *Boston Ins. Co.*, 223 Fed. 716 at 720, 722 (C. C. A. 6);
The Olga S., 25 Fed. (2d) 229 at 230, 231 (C. C. A. 5).

If it could be shown that the loss must certainly have occurred from the excepted cause if there had been no negligence, the carrier would be excused, but the burden of proof of this fact would be on the carrier.

Maghee v. *The Camden etc. R. Co.*, 45 N. Y. 514 at 523;
The Portsmouth, 9 Wall. 682 at 684;
Corsar v. *J. D. Spreckles etc. Co.*, 141 Fed. 260 at 264 (C. C. A. 9).

If there is any doubt whether its negligence did or did not contribute, that doubt must be resolved against the carrier and in favor of the shipper.

The Edwin I. Morrison, supra, page 212;
The Mohler, 88 U. S. 230 at 233.

In the case at bar, there is no doubt, because the District Court found the negligence of the ship contributed to the excepted peril, and its finding and that of the Commissioner on the facts have not been disturbed.

The ship claiming the benefit of conditional exception to its primary liability, has the burden of proof that the exception was fulfilled. Having failed to prove its defense, its liability as an insurer is unimpaired.

Galveston H. & S. A. Ry. Co. v. *Wallace,* 223 U. S. 481 at 492;
The Mohler, supra (88 U. S. 230 at 233);
Condict v. *Grand Trunk R. Co.,* 54 N. Y. 500 at 505;
Cases *supra.*

The ship, in the case at bar, pleaded the exception against "decay" as a complete defense (R. pp. 16-17) and alleged (R. p. 17) that it "was not due to any cause or event arising through any fault or negligence on the part of the vessel, her master, owner, agents or representatives * * *." But even if a partial exemption under an exception is permitted, and even were it pleaded as a partial defense, the ship has failed to sustain its burden of proof of the extent of its partial defense.

The Mary Belle Roberts, supra, 22 Fed. Cas. No. 13240;
The Rona, supra, 5 Asp. 259, 51 L. T. at 32.

The relation of carrier and the nature of exceptions in bills of lading, therefore, emphasize and require the application of the "equitable principle," not its abrogation.

Let us examine the exception clause in the bill of lading to see if there is some novel provision which would permit the carrier to escape the consequences of its negligence, as determined by the admiralty and common law.

The pertinent clause is No. 3 and provides, as far as it is applicable (R. p. 296):

> "and not accountable for loss or damage resulting from stowage, sweating * * * decay * * * however caused."

First, there is nothing therein to change the general rule.

Second, the clause *as it stands* is illegal and void, because it is unlawful to insert clauses which excuse the carrier from "loss or damage" arising from "negligence" in "care" of the cargo, or whereby such obligation to "care" for the cargo "is in anywise lessened, weakened or avoided" (*Harter Act*, U. S. Code of Laws, title 46, ch. 8, sec. 190, 191).

> *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 at 441;
> *The Delaware*, 161 U. S. 459 at 471;
> *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272.

And the Court will not read into the clause anything to change its plain, unequivocal language to make it legal, but will declare the entire clause void (*Calderon* case, *supra*, p. 279; *Woodbury* v. *Cincinnati, etc. Ry. Co.*, 40 Fed. 731 at 735, 738 (C. C. E. D. Tenn.); see also *Nicholas* v. *N. Y. etc. R. Co.*, 89 N. Y. 370 at 372).

Third, if the Court finds the language ambiguous, and will construe the clause or the words "however caused," it will do so "most strongly" in favor of the shipper and "most strongly against" the carrier which prepared the bill of lading (*Texas & Pac. R. Co.* v. *Reiss*, 183 U. S. at 626).

Thus, the Court may construe those words as did this Court in *Liverpool Steam Co.* v. *Phenix Ins. Co., supra* (129 U. S. at 441) or in *The Folmina, supra* (212 U. S. at 361)—paraphrasing:

> "however caused" means where "no human skill or diligence can guard against."

Or, as in *The Edwin I. Morrison, supra* (153 U. S. at 211), or in *Brauer* v. *Compagnia Navigazione, supra* (168 U. S. at 118)—paraphrasing:

> "however caused" means except where "the ship's negligence or that of their servants contributed."

Or, as in the case of *Clark* v. *Barnwell*, 12 How. at 280—paraphrasing, as did the Circuit Court of Appeals in the case at bar:

> "however caused" means unless it "might have been avoided by the exercise of reasonable skill and attention on the part of the" carrier.

This last interpretation is not the most favorable to the shipper, not the interpretation given in the ship's own answer (R. p. 17), but notwithstanding, it will not prevent recovery in this case because a "substantial" part of the damage admittedly could have been avoided by due care on the part of the carrier. It is still a defense of a conditional exception to its liability and the burden of proof is on the ship to fulfill the condition and defense in whole or, if permitted, in part. This burden it has not sustained (cases, *supra*).

Let us, however, assume that the burden is on the shipper to show the amount of the damage caused by the negligence of the carrier. It is determined by the well established rules of law applicable to the burden

of proof of damages, both in general law and in admiralty. One of such rules is that where, from the nature of the case, it seems impossible to distinguish between consequences due to the negligence of the wrongdoer and consequences not due to his negligence, the wrongdoer must bear the entire loss rather than the innocent party, or make the separation himself.

> *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251 at 260-262;
> *Westinghouse Co.* v. *Wagner Mfg. Co.,* 225 U. S. 604 at 622;
> *Jenkins* v. *Penn. R. Co.,* 67 N. J. L. 331 at 336;
> *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555 at 563-565;
> *Mary Belle Roberts, supra* (22 Fed. Cas. No. 13240).

As stated by the Court in *Hamilton Shoe Co.* v. *Wolf Brothers, supra,* by Mr. Justice PITNEY, at page 261:

> "But, as pointed out in the *Westinghouse Case* (p. 618), there is a recognized exception where the plaintiff carries the burden of proof to the extent of showing the entire profits, but is unable to apportion them, either because of the action of the wrongdoer in confusing his own gains with those which belong to plaintiff, or because of the inherent impossibility of making an approximate apportionment. There, 'on established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong.' "

and again:

> "Certainly, no formula is suggested by which it could be accomplished."

In the *Westinghouse* case, *supra,* this Court by Mr. Justice LAMAR said at page 622:

> "It may be argued that, in its last analysis, this is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate apportionment. If then the burden of separation is cast on the defendant it is one which justly should be borne by him, as he wrought the confusion."

In the case at bar, the carrier contended before the Commissioner to assess damages that apportionment was a "practical impossibility" (R. p. 326). The Commissioner, though he computed that the ventilation was negligently cut off 238 hours and properly cut off 144 hours (R. p. 422), also found that "from the nature of the case it was impossible" to apportion the damage (R. p. 420). The District Court agreed (R. p. 430), and the Circuit Court accepted the facts as found (R. pp. 442-443). "Certainly no formula is suggested by which it could be accomplished" (*Hamilton Shoe Co.* v. *Wolf Bros., supra,* p. 261). If there was a formula, it was the duty of the Circuit Court to send the case back for apportionment (*Dowagiac Mfg. Co.* v. *Minnesota Plow Co.,* 235 U. S. 641 at 650, 651) which it refused to do.

Where the nature of the case precludes the apportionment of the damages with certainty, the presumption of law is that the negligence caused the entire damage, and that the injured party has sustained his proof of damages, and whatever uncertainty there is must be borne by the wrongdoer (cases *supra*). Or, if the negligence of the injured party contributed, he recovers half the damages in admiralty (*The Max Morris,* 137 U. S.

1, citing with approval at page 14, *Snow* v. *Carruth, supra,* 1 Sprague 324, a carrier shipper case; *The Eugene F. Moran,* 212 U. S. 466 at 476).

Just what interpretation must be given to the words "however caused," to effect the expression of law stated by the Circuit Court of Appeals, we need not consider. It is clearly not the most favorable to the shipper, counter to the established rules of law, and it is illegal because it will actually result, in this case (*Chicago etc. Ry. Co.* v. *McCaul-Dinsmore Co.,* 253 U. S. 97), to relieve the carrier from "loss or damage arising from negligence" and "lessen, weaken or avoid" its obligation to care for the cargo (*Harter Act*; see *The Max Morris, supra* [137 U. S. 1] at page 14.)

As this Court, by Justice SUTHERLAND, said in the case of *Story Parchment Co.* v. *Paterson Co., supra,* at page 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

LOUIS JOFFE,
Counsel.

New York,
June, 1934.